

# SECURITY ASSISTANCE LEGISLATION AND POLICY

## INTRODUCTION

The United States (U.S.) security assistance program has its foundation in the U.S. public laws which provide security assistance authorizations and appropriations. The purpose of this chapter is to examine and highlight some of the key provisions of these security assistance-related statutes.

## CONGRESSIONAL AUTHORIZATIONS AND APPROPRIATIONS

Certain security assistance programs must be authorized and appropriated. Four such programs include the international military education and training (IMET) program, the foreign military financing program (FMFP), the economic support fund (ESF), and peacekeeping operations (PKO). Foreign military sales (FMS), commercial exports or direct commercial sales (DCS), drawdowns, and leasing are also addressed in security assistance legislation, not from a funding standpoint, since U.S. appropriated dollars are not involved, but from a reporting, control, and oversight perspective.

### Authorization Acts

With respect to the current U.S. security assistance program, two basic laws are involved. They are:

- Foreign Assistance Act of 1961 (FAA), as amended
- Arms Export Control Act (AECA), as amended

Both the FAA and AECA follow a succession of earlier acts which served as the basis for many of the current provisions in the FAA and AECA.

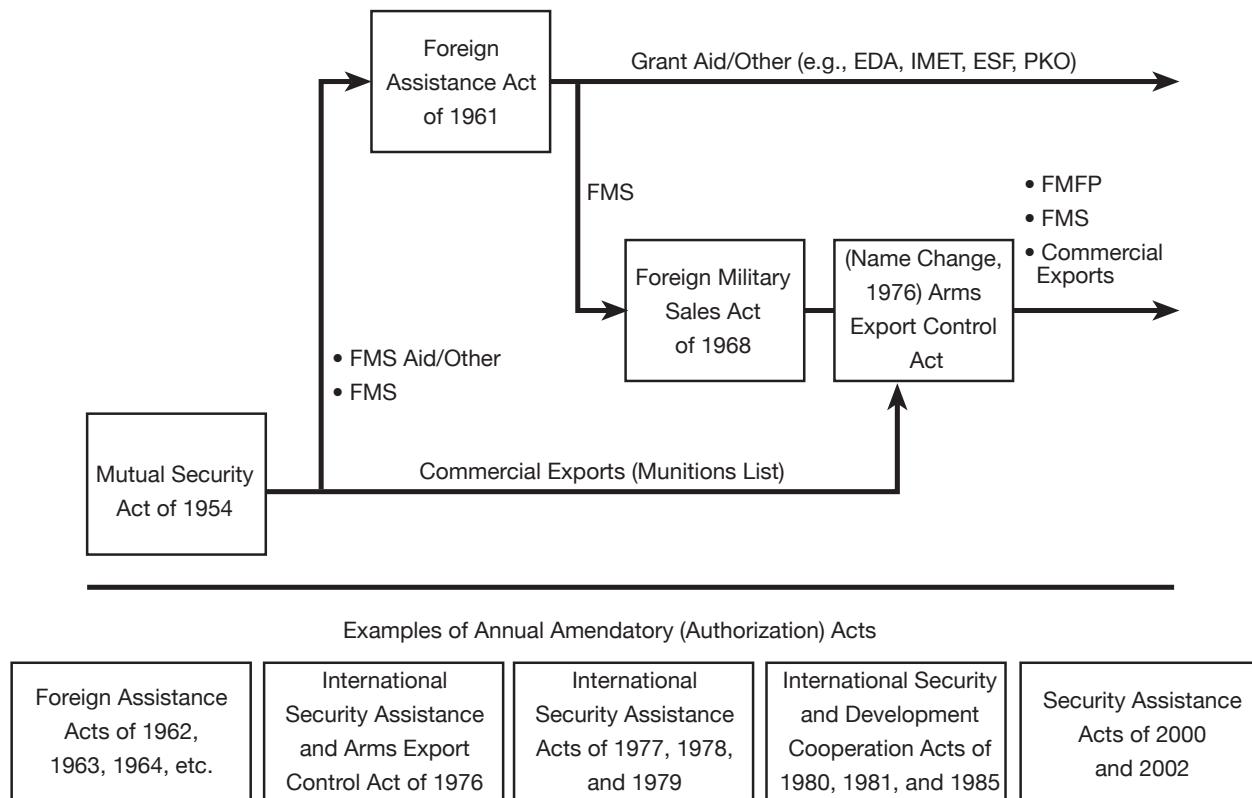
The FAA, originally enacted on 4 September 1961, contains many provisions which were formerly in the Mutual Security Act of 1954, as amended. Today, the FAA is the authorizing legislation for IMET, ESF, PKO, overseas security assistance program management, grant transfer of excess defense articles, emergency drawdowns, and a wide variety of other foreign assistance programs. Although the FAA contains well over 700 sections, much of the Act refers to programs outside the purview of security assistance for example:

- Development assistance
- Famine prevention
- International organizations
- The Support for East European Democracy Act of 1989 (SEED)
- Freedom for Russia and Emerging Eurasian Democracies and Open Markets (FREEDOM) Support Act
- International Counter Narcotics and Law Enforcement (INCLE)

The AECA came into being under a different title, the Foreign Military Sales Act of 1968 (FMSA). Before 1968, the basic authority for FMS was the FAA. The FMSA served to incorporate the FMS program under a new and separate act. The International Security Assistance and Arms Export Control

Act of 1976 changed the title of the FMSA to the current AECA. This 1976 Act also repealed Section 414 of the Mutual Security Act of 1954 which provided authority for commercial licensing through the *International Traffic in Arms Regulations* (ITAR). The commercial licensing DCS authority was placed in a new Section 38, AECA, Control of Arms Exports and Imports, which governs the licensing and sale of items through direct commercial channels. The AECA is the statutory basis for the conduct of FMS, funding for FMFP, and the control of commercial sales of defense articles and services. Figure 2-1 addresses the various acts discussed above in the context of their relationships to one another.

**Figure 2-1**  
**Major Security Assistance Authorization Acts Since 1954**



The FAA and the AECA may be amended by annual or biennial security assistance authorization acts. However, recently Congress has used annual Department of Defense (DoD) and Department of State (DoS) legislation along with any stand-alone legislation such as P.L. 104-164, 21 July 1996, and various functional laws such as the International Narcotics Control Act (INCA) or the Afghanistan Freedom Support Act (AFSA) of 2002 to amend the FAA or AECA. Congress was temporarily successful in the authorization process by legislating the Security Assistance Act of 2000, P.L. 106-280, 6 October 2000, and the Security Assistance Act of 2002, P.L. 107-228, 30 September 2002, for fiscal years (FYs) 2000 through 2003. No security assistance authorizations were specifically enacted for FYs 2004 through 2007. In the absence of an authorization act, the appropriations committee has included program authorization language to the affected annual appropriations act.

The Senate Foreign Relations Committee (SFRC) and the House Foreign Affairs Committee (HFAC) are responsible for foreign assistance and security assistance program authorization legislation. The Senate Armed Services Committee (SASC) and the House Armed Services Committee (HASC) are

responsible for defense programs authorization legislation which has included DoD authorities related to security assistance and authorities for the broadly defined security cooperation programs. Both security assistance and security cooperation authorized programs were addressed in earlier Chapter 1, “Introduction to Security Cooperation.”

## **Appropriations Acts**

Security assistance appropriations are included in the annual Foreign Operations, Export Financing, and Related Programs Appropriations Act (FOAA) for (year). As its title suggests, this act is the appropriation authority for several foreign relations programs, including security assistance. This act is one of twelve appropriations acts required every FY. Should a new FY begin before an appropriation act has been approved, Continuing Resolution Authority (CRA) is essential to keep the funded foreign assistance programs from coming to a standstill. The CRA is the authority to obligate funds against the FMFP, IMET, ESF, PKO, or other related security assistance appropriations for the new FY under a CRA granted by Congress in a Joint Resolution making temporary appropriations prior to passage of the regular appropriations act, or in lieu of such an act. Normally, the CRA is for a designated period less than a FY, and such a CRA does not usually allow funding for the start of any new programs.

The FY 2007 appropriations process was a different but not unprecedented use of a CRA. With exception of the already enacted appropriations for Departments of Defense and Homeland Security, the fourth CRA for FY 2007, P.L.110-5, 15 February 2007, provided for the remaining ten required appropriations, to include the FOAA, for the rest of the FY. Unless otherwise indicated in the CRA, program requirements, authorities, prohibitions, limitations, conditions, and appropriations for FY 2006 are to apply likewise for FY 2007 [Sec. 104, P.L.110-5].

The House Appropriations Committee (HAC) and the Senate Appropriations Committee (SAC) are the committees responsible for the timely legislating of all twelve annual bills. The 11 September 2001 (9/11) terrorist attack at the end of FY 2001 and military operations in Afghanistan and Iraq, coupled with domestic and world-wide natural disasters requiring vast amounts humanitarian and reconstruction assistance, further complicated the legislative appropriations process with the requirement for annual emergency supplemental appropriations, often including security assistance funding, in addition to the standard appropriations. The emergency supplemental for FY 2007 was U.S. Troop Readiness, Veterans’ Care, Katrina Recovery, and Iraq Accountability Appropriations Act, 2007, P.L.110-28, 25 May 2007. Chapter 1, “Introduction to Security Cooperation” provides information on recent appropriations legislation for FY 2007 and proposals for FY 2008.

## **Federal Statutes, Regulations, and *Federal Register* on the Internet**

The publication of U.S. law and regulations and announcement of official determinations, certifications, or notifications can be located in a timely manner at several different open U.S. government (USG) web sites on the internet.

### ***Slip Laws***

The first official publication of a law is often referred to as a “slip law” because of how it was once printed and bound for distribution. Because of wide internet access and the printing expense, slip laws are rarely used today. The best source for these now electronic slip laws is the Library of Congress (LOC) “Thomas” web site: <http://thomas.loc.gov/>. This site provides public access to the legislative process ranging from the first introduction of a bill, to committee and conference reports, to passage by both houses, to enactment by the president, and finally to the assignment of a public law

(P.L.) number by the archivist of the U.S. within the office of the federal register before paper printing by the government printing office (GPO).

Public law numbers are assigned based on the convening congress; e.g., P.L.109-145 is the 145<sup>th</sup> law of the 109<sup>th</sup> Congress. An extension of this example is the 109<sup>th</sup> Congress had two sessions: the first being calendar year (CY) 2005 and the second being CY 2006. The session numbering and time period of the congress coincide with the term of the just elected House of Representatives. The enacted laws for the first session CY 2005 of the 109<sup>th</sup> Congress included P.L.109-1 through P.L.109-318. The second session CY 2006 laws of the 109<sup>th</sup> Congress included P.L.109-319 through P.L.109-482.

All laws, including the annual appropriations and authorization acts, are initially slip laws that are compiled for each session of Congress into bound volumes, in order of enactment, referred to as “statutes at large.” Every six years, the statutes at large are incorporated into the United States Code (U.S.C.) in a process referred to as codification. However, a supplement is published during each interim year until the next comprehensive U.S.C. volume publication.

### ***United States Code***

The U.S.C. is the codification of the general and permanent laws of the U.S. by the office of the law revision counsel of the House of Representatives. The U.S.C. divides the laws into fifty general subject areas and published by the office of the law revision center. Maintaining an up-to-date copy of the lengthy U.S.C. is very costly and difficult to administer; however, it can be accessed within the GPO database via the internet at <http://www.gpoaccess.gov/uscode/index.html>. The general subject areas are referred to as “titles.” Most security assistance laws can be viewed under Title 22, “Foreign Relations and Intercourse.” Certain security assistance related and security cooperation law can be viewed under Title 10, “Armed Forces.” These titles are often referred to when differentiating between authorities and appropriations for the DoS and its responsibility for foreign affairs, and the DoD and its responsibility for national defense.

### ***Legislation on Foreign Relations Through (year)***

As a more timely reference, the SFRC and HFAC will annually publish a multi-volume set of documents to reflect new and amending legislation enacted from the previous calendar year to also include any related executive orders. Volume 1-A provides an up-to-date printing of the FAA and the AECA as well as any relevant still in effect portions of prior year appropriations and authorizations acts. As with the slip laws, a printed copy of this publication is difficult to come by and the January 2006 edition can be viewed on the internet at [http://www.dsca.mil/programs/LPA/2006/faa\\_aeca.paf](http://www.dsca.mil/programs/LPA/2006/faa_aeca.paf). The section footnotes of this document provide the tools in determining the slip law and U.S.C. section cross-referencing relationship. Both the Defense Security Cooperation Agency (DSCA) and Defense Institute of Security Assistance Management (DISAM) web pages provide URL links to this useful document.

### ***Slip Law and U.S.C. Relationship***

Once the slip law is codified into the appropriate general subject title, it can be referred to as its original enactment title, public law number, original section numbers, and date of passage with any subsequent amendments. Or it can be referred to as its U.S.C. title number with section numbers but different from those in the slip law.

For example, Section 21, Sales from Stocks, of the AECA, P.L.90-629, 22 October 1968, as amended, is codified as Title 22 U.S.C. Section 2761 with the same section title.

A security cooperation law example of this relationship is the initial funding, authority, and later codification of the now combating terrorism fellowship program (CTFP). Funding for this program was first provided in 2002 by DoD appropriations and annually thereafter. Subsequent DoD authorizations also provided for this program with Section 1221 of the National Defense Authorization Act for Fiscal Year 2004, P.L.108-136, 24 November 2003, finally amending Title 10 U.S.C. with a new Section 2249c authorizing CTFP on a permanent basis.

### ***Code of Federal Register***

The Code of *Federal Register* (CFR) is the codification of general and permanent rules published in the *Federal Register* (FR) by the executive branch and its agencies. Using the same U.S.C. organization procedure, the CFR is arranged into fifty general subject areas. Using administrative law authority and procedures, CFR regulations generally have the same authority as the law authorizing the regulation. A security assistance example of this procedure is the ITAR, 22 CFR Parts 120-130, which by delegation of authority is maintained by the deputy assistant secretary of state for defense trade controls (PM/DDTC). The authorizing authority for the ITAR is Section 38(a)(1), AECA [22 U.S.C. 2778]. The officially published ITAR can be viewed at the GPO site: <http://www.gpoaccess.gov/cfr/index.html> or in a timely manner, at the Bureau of Political-Military Affairs, Directorate of Defense Trade Control (PM/DDTC) site: <http://www.pmdtc.state.gov/consolidated.itar.htm>. Both the DSCA and DISAM webs provide convenient uniform resource locator (URL) links to these sites.

Using administrative law procedures, any proposed changes to the CFR are generally available for public comment along with notice of final changes in the daily *Federal Register* also maintained by GPO.

### ***Federal Register***

The FR is a daily publication of rules, proposed rules, notices by federal agencies, executive orders, and other presidential documents. Though paper printed twice each year, a more timely access to the FR is through the GPO web site in either text or adobe portable document (PDF) at: <http://www.gpoaccess.gov/fr/index.html>. Both the printed document and the web site have the announcements arranged on a daily basis for each agency (in alphabetical order) with a calendar year making a volume; e.g., CY 2007 is volume 72. There are no entries or announcements on weekends or federal holidays. A security assistance example in the use of the FR is the 30 May 2007 public notice on the *Federal Register*, volume 72, number 103 at: <http://a257.g.akamaitech.net/7/257/2422/01jan2007/1800/edocket.access.gpo.gov/2007/pdf/07-2637.pdf>, by DoD/DSCA of a proposed 36(b)(1) FMS sale to Iraq. Section 36(b)(1), AECA [22 U.S.C. 2776(b)(1)] requires this advance notification to Congress. Section 155, P.L.104-164, 21 July 1996, amended the U.S.C. with a new Section 36(f), AECA [22 U.S.C. 2776(f)] requiring the full unclassified text of any advance notification of a sale to Congress be published in the FR. It should be noted that DSCA provided a routine and prompt public announcement of this proposed 36(b)(1) FMS sales notification on 18 May 2007 on its web site specifically at [http://www.dsca.mil/PressReleases/36-b/2007/Iraq\\_07-30.pdf](http://www.dsca.mil/PressReleases/36-b/2007/Iraq_07-30.pdf).

### ***Defense Institute of Security Assistance Management Web Page***

Selected security assistance legislation and other related policy documents listed below can be located and viewed through a series of URL links on the DISAM web site at <http://www.disam.dsca.mil/pubs/USG/USGPubs.htm>.

- DoS international affairs (function 150) budget requests
- Congressional budget justifications (CBJ) for foreign operations
- Current and recent past FOAAs



- Current and recent past related Emergency Supplemental Appropriations Acts
- Current and recent past security assistance legislation articles from the *DISAM Journal*
- FAA/AECA
- DoS and USAID Strategic Plan for FY 2007 – FY 2012
- DoS active world map with security assistance information
- Conventional arms transfer policy (PDD-34) of 17 February 1995
- Defense trade security initiative (DTSI) of 26 May 2000
- The ITAR
- DoD/DSCA 36(b), AECA, congressional notifications for FMS letters of offer and acceptance (LOAs)
- DoS/PM/DDTC 36(c) and 36(d), AECA, congressional notifications for DCS licenses
- International Program Security (IPS) Handbook
- International Armaments Cooperation (IAC) Handbook

## **LEGISLATED MANAGEMENT OF SECURITY ASSISTANCE FUNDING**

### **Funding Obligations and Reprogramming**

Section 653(a), FAA, requires a presidential notification, delegated to the secretary of state, to Congress to allocate any funds appropriated by the annual FOAA. This funding allocation report must be made no later than thirty days after the enactment of a law appropriating funds to carry out any provision of the FAA or the AECA. Identified in the report is each foreign country and international organization to which the USG intends to provide any portion of the appropriated funds, and the amount of funds, by category of assistance, that the USG intends to provide to each.

Section 634(a), FAA, is the principal authority covering funding obligations and reprogramming actions. In general, special notification to Congress is required fifteen days in advance of any obligation of funds appropriated to carry out the purposes of the AECA or the FAA for any activities, programs, projects, types of material assistance, countries, or other operations which have not been justified to Congress or which are in excess of the amount justified to the Congress. This notification must be provided to the congressional foreign relations and appropriations committees.

Additionally, the notification must be made whenever a proposed reprogramming of funds exceeds \$1,000,000 and the total amount proposed for obligation for a country under the AECA in a FY exceeds by more than \$5,000,000 the amount specified for that country in the Section 653(a), FAA, report to Congress. The notification to Congress of such proposed reprogramming must specify the nature and purpose of the proposed obligation and to the extent possible, the country for which such funds would otherwise have been obligated.

Further statutory provisions regarding funding commitments for FMFP, IMET, ESF, and PKO are found in the annual FOAA. Under these provisions, special notification to the two appropriations committees is required fifteen days prior to the commitment of these security assistance funds when such funds are to be expended for the acquisition of specific types of defense articles which have not been previously justified to Congress, or which exceed by twenty percent the quantities previously justified

to Congress. This provision applies to the specified defense articles of major defense equipment other than conventional ammunition, aircraft, ships, missiles, or combat vehicles [Section 515, P.L. 109-102].

### **Availability of Funds**

FMFP and ESF are the only security assistance programs identified specifically in law for which appropriated funds may be made available for obligation after the expiration of the FY for which they were appropriated [Section 511, P.L. 109-102]. Transfers of FMF funds to the FMS trust fund are expenditure transfers. Once transferred, FMF funds are expended and remain available indefinitely for disbursement.

The IMET program does not have a similar multi-year feature, and all IMET funds, with two important exceptions, must be expended within the FY for which they were appropriated. The first exception involves what is termed an IMET FY fifth quarter. This procedure permits uncommitted appropriated dollars to be committed no later than 30 September of a given FY, but to be spent in the subsequent three-month period (i.e., the fifth quarter), through 31 December. The second exception began in FY 1999 when \$1M of the total funding appropriated for IMET is to remain available until expended. This figure was changed to \$3M for each FY beginning with FY 2002. This authority is to allow for the expenditure of all IMET funding without the loss of it at the end of the FY. [Title III, P.L.109-102 for FY 2006]

### **Non-Refunded Security Assistance Programs**

The FMS and DCS components of the security assistance are fully funded by direct cash outlays of the purchasing countries. Consequently, these security assistance activities do not require congressional budget authorizations or appropriations. Nevertheless, the financial activity generated by FMS cash purchases has a substantial impact on USG financial programs. Special accounting procedures have been instituted for the management of these funds, and FMS cash activities are documented in the annual U.S. budget in terms of the FMS Trust Fund. This trust fund will be further addressed in later Chapter 12, “Foreign Military Sales Financial Management.”

## **BASIC POLICIES**

The remainder of this chapter discusses a broad variety of statutory provisions which govern the management of security assistance. These provisions have been selected from the FAA, the AECA, or other sources, as identified, and are representative of the wide range of legislative rules which enable Congress to exercise its regulatory and oversight responsibilities. For ease of reference, applicable legislative references are cited either at the conclusion of the discussion of specific provisions or at the beginning of the discussion of a set of related provisions.

### **Reaffirmation of U.S. Security Assistance Policy**

The Congress reaffirms the policy of the U.S. to achieve international peace and security through the United Nations so that armed forces shall not be used except for individual or collective self-defense. The Congress hereby finds that the efforts of the U.S. and other friendly countries to promote peace and security continue to require measures of support based upon the principle of effective self-help and mutual aid [Section 501, FAA].

### **Ultimate Goal**

The ultimate goal of the U.S. continues to be a world which is free from the scourge of war and the dangers and burdens of armaments; in which the use of force has been subordinated to the rule of

law; and in which international adjustments are achieved peacefully. To achieve that goal, remains the policy of the U.S. to encourage regional arms control and disarmament agreements, and to discourage arms races. It is the policy of the U.S. to exert leadership in the world community to bring about arrangements for reducing the international trade in implements of war [Section 1, AECA].

### **Purpose of Arms Sales**

Congress recognizes that U.S. and other free and independent countries have valid defense requirements. Because of the growing cost and complexity of defense equipment, it is increasingly difficult and uneconomical for any country to fill all of its legitimate defense requirements from its own design and production base. It is the policy of the U.S. to facilitate the common defense by entering into international arrangements which further the cooperative exchange of data, research, development, production, procurement, and logistics support. To this end, the AECA authorizes sales by the USG to friendly countries in furtherance of the security objectives of the U.S. and in consonance with the principles of the *United Nations Charter* [Section 1, AECA].

Defense articles and services shall be furnished or sold solely for:

- Internal security
- Legitimate self-defense
- Preventing or hindering the proliferation of weapons of mass destruction and the means of delivering such weapons
- Permitting the recipient country to participate in regional or collective arrangements consistent with the *Charter of the United Nations*
- Supporting economic and social development activities by foreign military forces in less developed countries [Section 502, FAA, and Section 4, AECA]

### **Arms Sales and United States Foreign Policy**

It is the sense of the Congress that arms sales shall be approved only when they are consistent with U.S. foreign policy interests [Section 1, AECA]. The DoS and USAID Strategic Plan for FY 2007 through 2012 <http://www.state.gov/documents/organization/82819.pdf> includes five overall strategic goals:

- Achieve peace and security
- Governing justly and democratically
- Investing in people
- Promoting economic growth and prosperity
- Providing humanitarian assistance

The FAA and AECA provide various conventional arms transfer authorities to the president. The post-cold war era decision-making criteria used by the administration for determining FAA and AECA-authorized arms transfers was promulgated by the White House on 17 February 1995 as presidential decision directive (PDD) 34, U.S. Conventional Arms Transfer Policy (CATP) which can be viewed at <http://www.disam.dsca.mil/pubs/USG/pressrelease/ARMSTRAN95.htm>. Though the CATP was promulgated in 1995, it continues to be used today by the USG for determining whether an arms transfer is to take place.



## **Effect on United States Readiness**

FMS sales which would have an adverse effect on U.S. combat readiness shall be kept to an absolute minimum. For such sales, special congressional reporting is required [Section 21(i), AECA].

## **Conventional Arms Restraint**

Congress encourages the president to continue discussions with other arms suppliers in order to restrain the flow of conventional arms to less developed countries. It is the sense of the Congress that the aggregate value of foreign military sales in any FY shall not exceed current levels [Section 1, AECA]. This provision was added to the AECA in June 1976. Accordingly, the base year for “current levels” was FY 1975, which had a combined total of FMS and foreign military construction sales of \$15.8 billion.

## **Security Assistance Surveys**

Security assistance surveys include any survey or study conducted in a foreign country by USG personnel for the purpose of assessing the needs of that country for security assistance. Defense requirement surveys, site surveys, general surveys or studies, and engineering assessment surveys all represent various types of security assistance surveys. It is the policy of the U.S. that the results of security assistance surveys do not imply a commitment by the U.S. to provide any military equipment to any foreign country. Recommendations in such surveys should be consistent with the arms export control policy provided in the AECA. As part of the quarterly report required by Section 36(a), AECA, the president shall include information on all such surveys authorized during the preceding calendar quarter [Section 26(b), AECA].

## **Civilian Contract Personnel**

The president shall, to the maximum extent possible and consistent with the purposes of the AECA, use civilian contract personnel in any foreign country to perform defense services sold through FMS [Section 42(f), AECA].

## **Prohibition on Performance of Combatant Activities**

Personnel performing defense services sold through FMS may not perform any duties of a combatant nature. This prohibition includes any duties related to training and advising that may engage U.S. personnel in combat activities. Within 48 hours of the existence of, or a change in the status of significant hostilities or terrorist acts which may endanger American lives or property involving a country in which U.S. personnel are performing defense services, the president shall submit a report (in the format specified) to the Congress. [Section 21(c), AECA]

## **Limitation on Assistance to Security Forces**

No funding appropriated by the annual FOAA will be made available to any unit of the security forces of a country if the secretary of state has credible evidence that such unit has committed gross violations of human rights. Funding may be provided once the secretary determines and reports to Congress that the affected country is taking effective measures to bring the responsible members of the security forces unit to justice. [Section 551, P.L. 109-102]. This is commonly referred to as the Leahy Amendment. Annual DoD funding for U.S. exercises or training with foreign security force units are likewise restricted [Section 8060, P.L. 109-289 for FY 2007]. Proposed students and/or units are to be vetted using all available USG resources prior to any training or combined exercises.

## **Advisory and Training Assistance**

Advisory and training assistance conducted by military personnel assigned to overseas security assistance management duties shall be kept to an absolute minimum. Such advisory and training assistance shall be provided primarily by other U.S. military personnel not assigned under Section 515, FAA, and who are detailed for limited periods to perform special tasks. [Section 515(b), FAA]

## **Prohibitions Regarding Police Training**

None of the funds appropriated under the authority of the FAA shall be used to provide training or advice, or to provide financial support, for police, prisons, or other law enforcement forces of any foreign government. This prohibition does not apply to assistance and training in maritime law enforcement and other maritime skills nor shall apply to a country with long-standing democratic tradition, standing armed forces, and no consistent pattern of gross violations of internationally recognized human rights. [Section 660, FAA] This prohibition is not provided for AECA authorized programs.

## **Personnel End-Strengths**

Military and civilian personnel performing security assistance under the FAA or AECA must be within the personnel levels authorized for the DoD. No additional personnel are authorized for security assistance. [10 U.S.C. Section 2751, and note Section 605(a), P.L. 94-329]

## **Eligibility for Grant Aid**

No defense articles or defense service (including training) shall be furnished to any country on a grant basis unless it shall have agreed that:

- It will not, without the consent of the president, permit any use of such articles or services by anyone not an officer, employee, or agent of that country
- It will not, without the consent of the president, transfer (to another country) such articles or services by gift, sale, or other method
- It will not, without the consent of the president, use or permit the use of such articles or services for purposes other than those for which furnished
- It will provide substantially the same degree of security protection afforded to such articles or services by the USG
- It will permit continuous USG observation and review with regard to the use of such articles or services
- It will return to the USG, for such use or disposition as the USG may determine, any articles or services no longer needed. [Section 505(a), FAA].

This often referred to as the 505 Agreement normally entered into via diplomatic channels prior to a grant transfer.

## **Eligibility for Sales**

Similar to the 505 agreement conditions for grant transfers, no defense article or service shall be sold by the USG to any country or international organization unless:

- The president finds that it strengthens the security of the U.S. and promotes world peace

- The country (or international organization) has agreed not to transfer title to, or possession of, any articles/services (including training) furnished to it by the U.S., unless the consent of the president has first been obtained
- The country or international organization has agreed to not use or permit the use of such articles or related training or other defense service for purposes other than those for which furnished, unless the consent of the president has first been obtained
- The country (or international organization) has agreed to provide substantially the same degree of security protection afforded to such article or service by the U.S. government
- The country (or international organization) is otherwise eligible to purchase defense articles or services. [Section 3(a), AECA]

Beginning November 1999, all sales and lease agreements entered into by the U.S. government shall state that the U.S. retains the right to verify credible reports that such article has been used for a purpose not authorized under Section 4, AECA, or if such agreement provides that such article may only be used for purposes more limited than those authorized under Section 4, AECA, for a purpose not authorized under such agreement. [Section 3(g), AECA].

Effective May 2007, all FMS agreements shall state that the U.S. government will be permitted, upon request, to conduct end-use monitoring verification with respect to the use, transfer, and security of all articles and services. This includes inspection or inventories of articles, as well as review of host nation inventory and accountability records.

### **Presidential Determination**

In order for any security assistance to be provided to any country, it is required that such country first be deemed eligible to participate in U.S. security assistance programs. Such eligibility must be established by the president, and is confirmed in a written presidential determination (PD). This requirement is established in Section 503, FAA, and Section 3, AECA. The relevant provisions of these two laws require that grant military assistance or a sales program for any country may be authorized only when

. . . the president finds that the furnishing of defense articles and defense services to such country or international organization will strengthen the security of the United States and promote world peace. .

Consequently, annual budgetary planning and programming for security assistance is generally limited to those countries and international organizations for which such PDs of eligibility have been issued.

All such written determinations, which authorize the purchase of defense articles and services, are signed by the president and take the form of a memorandum for the secretary of state. Each determination is published in the *Federal Register* at the time of approval. A list of all such determinations approved to date can be found in the annual Congressional Budget Justification (CBJ) for Foreign Operations, Fiscal Year 20XX. This budget justification document was once referred to as the Congressional Presentation Document (CPD).

Such a determination is only a preliminary finding of eligibility, and it does not guarantee the approval of any specific requests for arms transfers or other assistance. A determination for a specific country needs to be made only once, and subsequent determinations for any country for which a determination was previously made are treated as amendments. Although budgetary

planning considerations may include certain countries which are awaiting a favorable determination, no budgetary implementation for security assistance for such countries may occur until such determinations have been made.

### **Other Restrictions**

Except where the president finds national security or U.S. interests require otherwise, no assistance shall be provided to countries that:

- Repeatedly provide support to international terrorists [Section 620(a), FAA]
- Is communist, to include, but not limited to: Democratic People's Republic of Korea, Peoples Republic of China, Republic of Cuba, Socialist Republic of Vietnam, and Tibet. [Section 620(f), FAA]
- Are indebted to any U.S. citizen for goods or services (where legal remedies are exhausted, the debt is not denied or contested, etc.) [Section 620(c), FAA]
- Nationalize, seize, or expropriate (without proper compensation) property owned or controlled by U.S. citizens, corporations, etc. [Section 620(e), FAA]
- Are in default on any FAA-authorized loan to the USG in excess of six months. [Section 620(q), FAA]
- Are engaged in illicit drug production or drug transiting and have failed to take adequate steps to include preventing such drugs from being produced or transported, sold to USG personnel or their dependents, or from being smuggled into the U.S. (50 percent of assistance is suspended.) [Section 490(a), FAA]
- Deliver or receive nuclear enrichment or reprocessing equipment, material, or technology [and have not entered into an agreement with the International Atomic Energy Agency (IAEA) to place all such equipment under an IAEA safeguards system], or transfer a nuclear device to a non-nuclear-weapon state. [Sections 101-03, AECA] This is often referred to as the Symington-Glenn Amendment.
- Which is in default to the USG for a period of more than one calendar year on any foreign assistance or security assistance loan (e.g., a development assistance, FMFP, or ESF loan), [Section 512, P.L.109-102]. This prohibition is renewed in the annual FOAA, and is generally referred to as the Brooke-Alexander Amendment.
- Prohibit or otherwise restricts, directly or indirectly, the transport or delivery of U.S. humanitarian assistance. [Section 620I, FAA]
- Grants sanctuary from prosecution to any individual or group which has committed an act of international terrorism or otherwise supports international terrorism. [Section 527, P.L.109-102]
- Does not comply, or make significant efforts for compliance, with minimum standards for combating the trafficking of people (TIP). [Section 110, P.L. 106-386]
- Is a party to the 17 July 1998 Rome Statute of the International Criminal Court and refuses to sign an Article 98 waiver exempting USG civilian, military, and contracted personnel. [Section 2007, Title II, P.L.107-206]
- Taxes U.S. goods and services being imported as U.S. assistance. [Section 506, P.L.109-102]

- Does not pay any accumulated automobile parking fines or property taxes in New York City or the District of Columbia. [Section 543, P.L.109-102]
- Knowingly transfers man-portable air defense systems (MANPADs) to a government or organization that supports terrorism. [Section 12, P.L.109-472]

### **Additional Restrictions**

The following restrictions, unlike those noted above, do not provide specific statutory authority for a presidential waiver. They require suspension/termination of assistance to any government:

- That is engaged in a consistent pattern of acts of intimidation or harassment directed against individuals in the U.S. [Section 6, AECA]
- That severs diplomatic relations with the U.S. or with which the U.S. severs such relations [Section 620(t), FAA]
- That prevents any U.S. person from participating in the provision of defense articles or services on the basis of race, religion, national origin, or sex [Section 505(g), FAA]. A similar provision prohibits military sales, sales credits, or guarantees [Section 5, AECA]
- Whose duly elected head of government is deposed by military coup or decree [Section 508, P.L. 109-102]

### ***Pakistan Waivers***

To combatant the war on international terrorism, the president is authorized to exempt Pakistan from the military coup restrictions of Section 508, P.L. 109-102; Pakistani persons from missile technology control regime (MTCR) restrictions of Section 73(e), AECA, and Section 11B(b)(5), Export Administration Act (EAA); and loan default restrictions of Section 620(q), FAA, and Section 512, P.L. 109-102, during FY 2006. [Sections 1-6, P.L. 107-57, 27 October 2001, as recently amended by Section 534(j), P.L.109-102]

### ***Human Rights***

The U.S. shall, in accordance with its international obligations as set forth in the *Charter of the United Nations* and in keeping with the constitutional heritage and traditions of the U.S., promote and encourage increased respect for human rights and fundamental freedoms throughout the world without distinction as to race, sex, language, or religion. Accordingly, a principal goal of U.S. foreign policy shall be to promote the increased observance of internationally recognized human rights by all countries. Furthermore, in the absence of a presidential certification to the Congress that extraordinary circumstances exist warranting the provision of such assistance, no security assistance may be provided to any country the government of which engages in a consistent pattern of gross violations of internationally recognized human rights. [Section 502B, FAA]

The secretary of state shall transmit to the Congress, as part of the presentation materials for security assistance programs proposed for each FY, a full and complete report, prepared with the assistance of the assistant secretary of state for human rights and humanitarian affairs, with respect to practices regarding the observance of and respect for internationally recognized human rights in each country proposed as a recipient of security assistance. [Section 502B, FAA]

## **SECURITY ASSISTANCE ORGANIZATIONS OVERSEAS**

The following is an overview of legislated authorities and limitations regarding the overseas security assistance organization (SAO), e.g., office of defense cooperation (ODC), U.S. military



assistance group (MAG), etc. A more in-depth description of the duties of an SAO is provided in Chapter 4, “Security Assistance Organizations Overseas,” and Chapter 17, “Resource Management for the Security Assistance Organization.”

### **Security Assistance Organization Functions**

The president may establish and assign members of the U.S. armed forces to an SAO to perform one or more of the following seven functions:

- Equipment and services case management
- Training management
- Program monitoring
- Evaluation and planning of the host government’s military capabilities and requirements
- Administrative support
- Promoting rationalization, standardization, interoperability, and other defense cooperation measures
- Liaison functions exclusive of advisory and training assistance [Section 515(a), FAA]

Advisory and training assistance conducted by SAO personnel shall be kept to an absolute minimum. [Section 515(b), FAA] Such assistance, rather, shall be by other personnel detailed for limited periods to perform specific tasks.

### **Security Assistance Organization Size**

The number of members of the armed forces assigned to a foreign country may not exceed six unless specifically authorized by the Congress. The president may waive this limitation if he determines and reports to the congressional foreign relations committees, thirty days before the introduction of the additional military personnel, that U.S. national interests require that more than six members of the armed forces be assigned to a particular country not designated in the statute to exceed six. Countries designated to have more than six U.S. military personnel are identified in Section 515(c)(1), FAA.

The total number of U.S. military personnel assigned to a foreign country in a FY may not exceed the number justified to the Congress in the annual congressional budget justification materials, unless the congressional foreign relations committees are notified thirty days in advance.

### ***Sales Promotion by the Security Assistance Organization***

The president shall continue to instruct U.S. diplomatic and military personnel in U.S. missions abroad that they should not encourage, promote, or influence the purchase by any foreign country of U.S.-made military equipment, unless they are specifically instructed to do so by an appropriate official of the executive branch [Section 515(f), FAA].

### ***Chief of U.S. Diplomatic Mission***

The president shall prescribe appropriate procedures to assure coordination among representatives of the USG in each country, under the leadership of the chief of the U.S. diplomatic mission. [Section 622, FAA, and Section 2, AECA].

U.S. military personnel assigned to security assistance organizations shall serve under the direction and supervision of the chief of the U.S. diplomatic mission in that country [Section 515(e), FAA].

## **MILITARY SALES**

In general, the AECA authorizes two ways a country or international organization can purchase U.S. defense articles, services, or training. The first method is FMS through a government-to-government contract or the FMS LOA case. This FMS case can be filled by sale from U.S. stock, a USG purchase from industry, or by providing credit to fill the requirement either by sale from stock or by purchase from industry. The FMS process, procedures, and policies will be addressed in detail in later beginning in Chapter 5, “Foreign Military Sales Process.”

The second purchasing method is DCS by allowing, with an export license issued by the DoS, the country or international organization to purchase directly from U.S. industry. The DCS process and policies will be further addressed in later Chapter 15, “A Comparison of Foreign Military Sales and Direct Commercial Sales.”

### **Sales from Stock**

The country agrees to pay the USG for defense articles and defense services sold from DoD and U.S. Coast Guard stocks as follows:

- The actual (stock-list) value for defense articles not intended to be replaced at the time of agreement to sell
- The replacement cost for defense articles intended to be replaced, including contract of production costs less any depreciation in value
- The full cost to the USG for defense services; in the case of a country which is concurrently receiving IMET assistance, only those additional costs that are incurred by the USG in furnishing such assistance will be charged
- The sales price shall also include appropriate charges for:
  - Administrative services (surcharge)
  - A proportionate amount of any nonrecurring costs of research, development, and production of major defense equipment (does not apply to FMS cases which are wholly financed with U.S. provided grant funds)
  - The recovery of ordinary inventory losses associated with the sale from stock of defense articles that are being stored at the expense of the purchaser
- Unless the president determines it to be in the national interest, payment shall be made in advance of delivery or performance [Section 21, AECA]

There are situations where certain costs may be waived or reduced. Many of these are addressed later in this chapter under the heading, Additional Provisions Relating to North Atlantic Treaty Organization (NATO), NATO Members, Japan, Australia, New Zealand, and Other Eligible Countries.

### **Procurement Sales**

The USG may procure defense articles and services for sale to an FMS purchaser if the purchaser provides the USG with a dependable undertaking by which it agrees to pay the full amount of such contract. This will assure the USG against any loss; to make funds available in such amounts and at such times as may be required by the contract (and to cover any damages/termination costs).

Such foreign purchaser payments shall be received in advance of the time any payments are due by the USG. Interest shall be charged on the net amount by which such foreign purchaser (country

or international organization) is in arrears under all of its outstanding unliquidated dependable undertakings, considered collectively. [Section 22, AECA]

### **Credit Sales**

The USG is authorized to finance procurements of defense articles, defense services, and design and construction services by friendly foreign countries and international organizations [Section 23, AECA]. This financial assistance is FMFP either as a grant or loan. With a couple of exceptions, recent FMFP has been all grant requiring no repayment.

Repayment of loans in U.S. dollars is required within twelve years, unless a longer period is authorized by statute. [Section 23(b), AECA] The FMFP loans authorized under Section 23, AECA, shall be provided at rates of interest that are not less than the current average market yield on outstanding marketable obligations of the U.S. of comparable maturities. [Section 31(c), AECA]

### **Foreign Military Construction Sales**

The president may sell design and construction services using the FMS process to any eligible foreign country or international organization if such country or international organization agrees to pay in U.S. dollars the full cost to the USG of furnishing such services. Payment shall be made to the USG in advance of the performance of such services. [Section 29, AECA]

### **Sales to United States Companies**

The president may sell defense articles [e.g., government furnished equipment (GFE) or material (GFM)] to a U.S. company for incorporation into end items (and for concurrent or follow-on support) that are, in turn, to be sold commercially DCS to a foreign country or international organization under Section 38, AECA, and to sell defense services in support of such sales of defense articles, provided that such services may be performed only if:

- The end item to which the articles apply is procured for the armed forces of a foreign country or international organization
- The articles would be supplied to the prime contractor as GFE or GFM if the article was being procured for the use of the U.S. armed forces
- The articles and services are available only from USG sources or are not available to the prime contractor directly from U.S. commercial sources at such times as may be required to meet the prime contractor's delivery schedule [Section 30, AECA]

### **Direct Commercial Sales**

The president, delegated to the secretary of state, is authorized to control the DCS of U.S. defense articles and services by U.S. industry. [Section 38(a)(1), AECA] Procedures for U.S. industry to obtain export licenses for DCS are codified by the DoS within the ITAR, 22 C.F.R. 120-130. Section 121.1, ITAR, is the U.S. Munitions List (USML) defines by category what constitutes a defense article, services, and related technical data. This arms control authority by the president is similarly extended to include the import defense articles and services and has been delegated to the attorney general. Chapter 7, "Technology Transfer, Export Controls, and International Program Security," provides further discussion on the export licensing of DCS.

## **DRAWDOWN AUTHORITIES**

### **Special Emergency Drawdown Authority**

If the president determines and reports to Congress that an unforeseen military emergency exists and that such emergency requirement cannot be met under the AECA or any other authority, the president may direct the drawdown of defense articles, services, or training from DoD of an aggregate value not to exceed \$100 million in any FY. [Section 506(a)(1), FAA]

A second special drawdown authority of \$200M in defense articles, services, and training for each FY also has been established [Section 506(a)(2), FAA]. The authorized purposes for the latter drawdown authority include counter-narcotics, anti-terrorism, non-proliferation, disaster relief, migration and refugee assistance, and support of Vietnam War era missing-in-action/prisoners of war (MIA/POW) location and repatriation efforts. Restrictions in the annual Section 506(a)(2) drawdown include not more than \$75M may come from DoD resources, not more than \$75M may be provided in support of counter-narcotics, and not more than \$15M may be provided in support of Vietnam War era MIA/POW location and repatriation. While all Section 506 drawdown actions require notification to Congress, drawdowns in support of counter-narcotics or anti-terrorism assistance require at least fifteen days advance notification before taking place.

Section 576, P.L. 105-118, amended the FAA to provide the authority for the use of commercial transportation and related services acquired by contract for the drawdown if the contracted services cost less than the cost of using USG resources to complete the drawdown [Section 506(c), FAA]. The use of commercial rather than USG transportation assets to complete the drawdown is to be reported to Congress to include any cost savings realized [Section 506(b)(2), FAA].

In the period FY 1990 through FY 2005, a total of \$1,182.6 million in drawdown authority was used incrementally by the president to provide emergency assistance under the authorities of Section 506, FAA. Section 506(c), FAA, provides authority for appropriations to reimburse DoD and the military departments (MILDEPs) for costs in providing emergency drawdown defense articles, services, and training; however, this authority is rarely provided. Likewise, because of the negative impact of this type of drawdown on the military departments, it has become a tool of last resort and reluctantly directed.

### **Peacekeeping Emergencies**

The drawdown of commodities and services is authorized from the inventory and resources of any agency of the USG of an aggregate value not to exceed \$25M in any FY to meet an unforeseen emergency requirement for peacekeeping operations. The authority for reimbursement is rarely provided. [Section 552(c)(2), FAA]

### **War Crimes Tribunals Drawdown**

The FY 2006 FOAA authorizes the FY 2006 drawdown of up to \$30M in commodities and services in support of the United Nations War Crimes Tribunal established with regard to the former Yugoslavia for the just resolution of changes regarding genocide or other violation of international humanitarian law [Section 545, P.L. 109-102].

### **Drawdown Policy and Procedures**

The following general guidelines and policies have evolved for execution of drawdowns:

- Equipment to be provided must be physically on hand (excess or non-excess)

- No new contracting is authorized to support drawdowns-may use commercial contracts for transportation services only if scope of existing contracts encompass drawdown requirement
- Services must reimburse the Defense Logistics Agency (DLA) for any working capital fund material or services provided in support of drawdowns
- Service tasked with providing specific equipment will fund transportation to final destination
- Airlift and sealift can only be provided using military air or sealift military aircraft (MILAIR/MILSEA) or appropriate time-charter contracts if the scope of existing contracts cover the proposed use
- Where possible, complete support packages are normally provided for any major end items

In general, equipment and spare parts now being provided under drawdown are increasingly coming from units, prepositioned equipment storage, or operational logistics stocks. Residual equipment that is excess and can be released without adverse operational impact is increasingly in very poor condition requiring significant repair or refurbishment. Where such repair can be legally performed under drawdown authority, it only adds to the DoD operational and maintenance (O&M) funding impact on the services in supporting the drawdown effort.

Drawdowns do not provide additional budget authority to DoD. The military services (MILSVCs) are required to use currently allocated O&M funds to provide training services, packing, crating, and handling services, transportation services, repair/refurbishment services, and the provision of spare parts or support services from the working capital fund-operated DLA activities.

### **SPECIAL PRESIDENTIAL WAIVER AUTHORITY**

In accordance with Section 614, FAA, the president may authorize the furnishing of limited assistance and sales, without regard to any other laws, when determined and reported to Congress that to do so is important to U.S. national security interests. In addition, the president may make sales, extend credit, and issue guarantees under the AECA without regard to any other laws when determined and reported to Congress that to do so is vital to U.S. national security interests. The following limitations apply in a given FY:

- The use of up to \$250 million of funds made available under the FAA (grants) or the AECA (grants or loans), or \$100 million of foreign currencies accruing under the FAA or any other law. However, not more than \$50 million of the \$250 million limitation may be allocated to any one country, unless such country is a victim of active aggression
- Not more than \$750 million in sales under the AECA
- Not more than \$500 million of the aggregate limitation of \$1 billion (i.e., \$250 million assistance and \$750 million sales) may be allocated to any one country

### **CONGRESSIONAL REVIEW OF PROPOSED TRANSFERS**

#### **Foreign Military Sales**

The president (delegated to the secretary of defense) shall submit a numbered certification (with justification, impact, etc.) to the Congress before issuing an LOA to sell defense articles or services



for \$50 million or more, or any design and construction services for \$200 million or more, or major defense equipment for \$14 million or more. The dollar thresholds for notification for NATO countries, Japan, Australia, and New Zealand are \$100 million, \$300 million, and \$25 million respectively.

Major Defense Equipment (MDE) means any item of significant military equipment (SME) on the USML having a nonrecurring research and development cost of more than \$50 million or a total production cost of more than \$200 million. SME is defined in Section 47(9), AECA, as a defense article identified on the USML for which special export controls are warranted because of the capacity of such articles for substantial military utility or capability. The USML is required by Section 38, AECA, and is maintained by the DoS within Section 121.1 of the ITAR which can be viewed at <http://www.pmddtc.state.gov/reference.htm#regs>.

The LOA shall not be issued if the Congress, within thirty calendar days after receiving such certification, adopts a joint resolution stating it objects to the proposed sale. However, such action by Congress does not apply if the president states in his certification that an emergency exists which requires such sale in the national security interests of the U.S. [Section 36(b)(1), AECA].

In order to provide the Congress with sufficient time to review such cases, the Defense Security Cooperation Agency has agreed to provide Congress with a 20-day informal notification of such cases prior to the formal submission of the thirty-day statutory notification. [*The Security Assistance Management Manual* (SAMM), Section C5.6.3]. Additionally, while the law does not address this, policy has been established that notifications will not be provided unless Congress is in session to receive the notification.

An exception to the above procedure exists for NATO, NATO member countries, Australia, Japan, and New Zealand. For these exempted countries, the formal statutory notification period is only fifteen days. Furthermore, the twenty days informal, advance notification period is not required for these countries.

### **Direct Commercial Sales**

Thirty days before the issuance of any export license for MDE in excess of \$14 million or other defense articles or services in excess of \$50 million, the president (delegated to the secretary of state) shall submit a numbered certification to the Congress. Dollar thresholds for notification for NATO countries, Japan, Australia, and New Zealand are \$25 million and \$100 million respectively. Unless the certification states that an emergency exists, an export license for the items shall not be issued within a thirty-calendar day congressional review period. The twenty-day informal advance notification required for FMS does not apply to the DCS licensing process. Further, such license shall not be issued if the Congress, within such thirty-day period, adopts a joint resolution objecting to the export. The congressional review period for NATO, NATO members, Australia, Japan, and New Zealand is fifteen days as in the FMS process [Section 36(c), AECA].

The licensing of any USML category I small arms (.50 caliber or less) valued at \$1 million or more for any country must be also be notified to Congress and is subject to the fifteen or thirty-day joint resolution objection process [Section 36(c), AECA]. It should be noted that this small arms notification does not apply to the FMS process.

Normally, it is the country's decision to purchase FMS or DCS. However, the president (delegated to the secretary of defense) may require that any defense article or service be sold under FMS in lieu of commercial export channels. [SAMM, C4.5.9] The president may also require that persons engaged in commercial negotiation for the export defense articles and services keep the president fully

and currently informed of the progress and future prospects of such negotiations [Section 38(a)(3), AECA].

### **Third Country Transfers**

The recipient country, as a condition of sale, must agree not to transfer title or possession of defense articles or services (including training) to another country, unless the consent of the president has first been obtained. This authority to transfer is normally provided in writing from the DoS.

Furthermore, the Congress has a thirty-calendar day review period (fifteen days for NATO, NATO members, Japan, Australia, and New Zealand) for proposed third country transfers of defense articles or services valued (in terms of its original acquisition cost) at \$14 million or more for MDE, or \$50 million or more for other defense articles, services, or training. The dollar thresholds for notification for NATO countries, Japan, Australia, and New Zealand are \$25 million and \$100 million respectively [Section 3(d), AECA].

The following are exceptions to this congressional review process for third country transfers:

- The president states in the certification submitted that an emergency exists which requires that consent to the proposed transfer becomes effective immediately
- Transfers of maintenance, repairs, or overhaul defense services or repair parts if such transfers will not result in any increase in military capabilities
- Temporary transfers of defense articles for the sole purpose of receiving maintenance, repair, or overhaul
- Cooperative cross-servicing arrangements or lead-nation procurement among NATO members. Note, however, that Section 36(b) notifications must identify the transferees on whose behalf the lead-nation procurement is proposed

The Congress can adopt a joint resolution of disapproval of the proposed transfer during the fifteen or thirty-day review period. However, presidential approval is not required for third country transfers or change in end-use if all the following conditions are satisfied:

- The U.S. article is being incorporated as a component within a foreign defense article
- The recipient is the government of a NATO country, Japan, Australia, or New Zealand
- The recipient is not a Section 620A, FAA-designated country [supports international terrorism]
- The U.S.-origin component is not SME, an article requiring Section 36(b), AECA notification, and identified by regulation as an MTCR item
- The country or organization provides notification to the USG within thirty days after the transfer [Section 3(b), AECA]

### **Leases of Defense Articles**

The president may lease defense articles in the stocks of the DoD to an eligible foreign country or international organization if:

- He determines there are compelling foreign policy and national security reasons for providing such articles on a lease basis rather than on a sales basis under the AECA

- He determines that the articles are not for the time needed for public use
- The country or international organization has agreed to pay in U.S. dollars all costs incurred by the USG in leasing such articles, including reimbursement for depreciation of such articles while leased, and the replacement cost of the articles are lost or destroyed while leased [Sections 61-64, AECA]

The above cost reimbursement requirements do not apply to leases entered into for purposes of cooperative research or development, military exercises, or communications or electronics interface projects.

With a presidential national security interest determination, the requirement for reimbursement of depreciation of any leased article which has passed three-quarters of its normal service life can also be waived. This waiver authority cannot be delegated below the secretary of defense and is to be used sparingly. [Section 61(a), AECA]

Replacement cost of any leased item lost or destroyed would be either:

- In the event the USG intends to replace the item, the replacement cost of the item
- In the event the USG does not intend to replace the item, the actual value (less any depreciation in the value) specified in the lease agreement [Section 61(a)(4), AECA]

Each lease agreement shall be for a fixed duration, not to exceed five years, and shall provide that, at any time during the duration of the lease, the president may terminate the lease and require the immediate return of the leased articles. The maximum five year period for a lease would begin at the time of delivery to the country if the item being leased requires an extended modification or overhaul period exceeding six months before delivery. An extension of a lease is permitted, but must be reported to Congress as described below.

Defense articles in the stocks of the DoD may be leased or loaned to a foreign country or international organization under the authority of Chapter 6, AECA, or Part II, Chapter 2, FAA, but may not be leased to a foreign country or international organization under the authority of 10 U.S.C. 2667.

For any lease for a period of one year or longer, the Congress must be given a thirty-day advance notification. Further, if the lease is for one year or longer, and is valued at \$14 million or more for MDE, or \$50 million or more for other defense articles, the Congress may adopt a joint resolution during the thirty-day notification/review period prohibiting the proposed lease. The dollar thresholds for notification for NATO countries, Japan, Australia, and New Zealand are \$25 million and \$100 million respectively.

The congressional advance notification period for leases to NATO, NATO members, Japan, Australia, and New Zealand is fifteen days. Both the fifteen and thirty-day periods can be waived by the president in the event of an emergency.

### **Congressional Joint Resolutions**

As just described, the AECA contains provisions for the congressional rejection of proposals for FMS and direct commercial sales, as well as for third country transfers and leases of U.S. defense articles. The mechanism for such congressional action is a joint resolution. This is a statement of disapproval of a proposed sale, transfer, or lease, which is passed by simple majority votes in both the Senate and the House of Representatives. This joint resolution must be then sent to the president

for review and approval by enactment. Since the president is unlikely to approve the rejection of an action which his administration originally proposed to Congress, the president will likely veto such a joint resolution, returning it to Congress. Unless Congress is able to override the president's veto by obtaining a two-thirds majority vote in each house in support of the original resolution of rejection, the sale, transfer, or lease will be permitted. Should Congress, however, muster sufficient votes to override the president's veto, the proposed sale, transfer, or lease would not be authorized.

### **Other Reports to Congress**

There are numerous other reports provided to Congress concerning security assistance programs. The following list, which is by no means inclusive, is representative of such reports. A comprehensive listing of security assistance reports submitted to Congress by DoD elements can be found DoD 5105.38-M, SAMM, Appendix 5, "Congressional Reports and DSCA Reports Control System."

### **Quarterly Reports to Congress**

- A listing of all unaccepted/uncanceled LOAs by country for major defense equipment valued at \$1 million or more [Section 36(a)(1), AECA]
- A listing of all LOAs accepted during the FY [Section 36(a)(2), AECA]
- The cumulative dollar value of sales credit agreements during the FY [Section 36(a)(3), AECA]
- A listing of all commercial export licenses issued during the FY for major defense equipment valued at \$1 million or more to also include USML category I small arms [Section 36(a)(4), AECA]
- A listing of all security assistance surveys authorized during the preceding quarter; Congress shall be authorized access to such survey reports upon request [Section 26, AECA]

### **Annual Reports to Congress**

#### ***Arms Sales Proposal***

On or before 1 February of each year, the president shall transmit to the Congress the annual "Arms Sales Proposal" covering all sales, including FMS and DCS of major weapons or weapons-related defense equipment for \$7 million or more, or of any other weapons or weapons-related defense equipment for \$25 million or more, which are considered eligible for approval during the current calendar year. This report is required by Section 25(a), AECA, and is generally referred to as the *Javits Report*, named for its principal sponsor, former Senator Jacob Javits (D-NY). By policy, no sales or licensing notifications will take place for the FY until the Javits Report is received by and briefed to Congress, which of course must be in session to receive the report.

#### ***End-Use Monitoring***

With the annual Congressional Budget Justification for Foreign Operations, FY 20XX, submitted not later than 1 February to the Congress [Section 634, FAA], a report regarding the implementation of end-use monitoring to include costs and numbers of personnel associated with the program shall be included. Additionally, the report will include numbers, range, and findings of end-use monitoring of U.S. transfers of small arms and light weapons [Section 40A(c), AECA].

### ***Possible Excess Defense Articles***

Beginning with FY 2003, like the *Javits Report* for sales, the president shall transmit to the Congress not later 1 February annually a report a list of weapons systems that are SME, and numbers thereof, that are believed likely to become available for transfer as excess defense articles (EDA) during the next twelve months [Section 25(a)(13), AECA].

### ***Agent Fees***

The secretary of state shall require reporting on political contributions, gifts, commissions, and fees paid, offered, or agreed to be paid in connection with FMS or DCS; such information shall be made available to Congress upon request [Section 39, AECA].

### ***Foreign Training Report***

A joint secretary of state and secretary of defense report is to be submitted to Congress not later than 31 January each year to include training provided the previous and current FYs. For each training activity, it is to include foreign policy justification and purpose plus number of foreign personnel trained, their units, and the location. For each country, it is to include aggregate number of students and costs. With respect to the U.S. personnel, it is to include operational benefits derived and what units were involved. Beginning 30 September 2002, unless notified in writing ninety calendar days in advance for a specified country, this report is not to include any training provided to NATO countries, Australia, Japan, or New Zealand [Section 656, FAA].

### ***Anti-Boycott Determination***

The Anti-Economic Discrimination Act of 1994 [Sections 561-565, P.L.102-236] states that, effective 30 April 1995, the sale or lease of any defense article or service is prohibited to any country or international organization that maintains a policy or practice of:

. . . sending letters to U.S. firms requesting compliance with, or soliciting information regarding the secondary or tertiary Arab economic boycott of Israel.

The president can annually waive this transfer prohibition for one year on the basis of national interest and promotion of U.S. objectives to eliminate the Arab boycott, or on the basis of national security interest.

On 24 April 1997, the president delegated the annual report and waiver authority to the secretary of state. For the 2006 report, the secretary waived the prohibition against Kuwait, Lebanon, Qatar, Saudi Arabia, the United Arab Emirates, and Yemen until 1 May 2007 on the basis of national interest and the promotion of U.S. objectives to eliminate the boycott. The countries of Algeria, Bahrain, Bangladesh, Djibouti, Egypt, Iraq, Jordan, Mauritania, Morocco, Nigeria, Oman, Pakistan, Somalia, Sri Lanka, Tanzania, Tunisia, and Uganda were determined to have no current boycott policy or practice.

## **ADDITIONAL PROVISIONS RELATING TO NATO, NATO MEMBERS, JAPAN, AUSTRALIA, NEW ZEALAND, AND OTHER ELIGIBLE COUNTRIES**

### **Reduction or Waiver of Nonrecurring Cost Charges**

The president may reduce or waive nonrecurring cost (NC) charges required by Section 21(e)(1)(B), AECA, [e.g., a proportionate amount of any nonrecurring costs of research, development, and production of major defense equipment] for particular sales that, if made, would significantly advance USG interests in NATO standardization; standardization with Japan, Australia, or New Zealand in furtherance of the mutual defense treaties between the U.S. and those countries; or foreign procurement in the U.S. under co-production arrangements. [Section 21(e)(2)(A), AECA]



Beginning in FY 1997, nonrecurring costs for research and development (R&D) may also be waived for an FMS sale to any eligible country if:

- Applying the cost would result in the loss of a sale
- The waived costs would be substantially offset in lower realized unit cost to the USG through increased production resulting from the FMS sale [Section 21(e)(2)(B), AECA]

Further, the president may waive the charges for administrative services under Section 21(e)(1)(A), AECA, in connection with any sale to the NATO Maintenance and Supply Agency in support of a weapon system partnership agreement or NATO/SHAPE project. [Section 21(e)(3), AECA]

### **Cooperative Furnishing of Training**

The president may enter into NATO standardization agreements and may enter into similar agreements with Japan, Australia, New Zealand, and major non-NATO allies for the cooperative furnishing of training on a bilateral or multilateral basis, if such agreement is based on reciprocity. Such agreements shall include reimbursement for all direct costs but may exclude reimbursement for indirect costs, administrative surcharges, and costs of billeting of trainees [Section 21(g), AECA].

### **Major Non-North Atlantic Treaty Organization Allies**

For many years, 10 U.S.C. 2350a(i)(3) identified Australia, Egypt, Israel, Japan, and Korea as major non-NATO allies (MNNA) as a DoD authority for cooperative research and development. In 1996, P.L. 104-164 amended the FAA to add New Zealand and, perhaps more importantly, provided the president with authority to designate a country as a MNNA for the purposes of the FAA and the AECA, or terminate such a designation, with a thirty-day advance notification to Congress (Section 517, FAA). Subsequently, Argentina, Jordan, Bahrain, Kuwait, Morocco, Pakistan, Philippines, and Thailand have been added using the notification procedure. The country of Taiwan is also to be treated as though it is a MNNA [Section 1206, P.L. 107-228]. The statutory benefits in the FAA and the AECA of being designated a MNNA include eligibility for:

- Priority delivery of excess defense articles, only to include Egypt, Jordan, and Israel, [Section 516 (c)(2), FAA]
- Stockpiling of U.S. defense articles [Section 514 (c)(2), FAA]
- Purchase of depleted uranium anti-tank rounds [Section 620G, FAA]
- With a reciprocity agreement, be exempted of indirect costs, administrative charges, and billeting costs for training [Section 21(g), AECA]
- Use of any allocated FMFP funding for commercial leasing of defense articles [Section 510, P.L. 109-102]

### **Incremental Tuition Pricing for International Military Education and Training - For Designated Countries**

The president is authorized to charge only those additional costs incurred by the USG in furnishing training assistance to countries concurrently receiving IMET. While Section 546(a), FAA, prohibits the high income countries of Austria, Finland, Korea, Singapore, and Spain from receiving IMET assistance, they remain eligible for FMS-incremental tuition prices. [Section 21(a)(1)(c), AECA]

Effective 14 November 2005, though not an IMET recipient and only receiving FMFP assistance, Israel is authorized the IMET tuition price for training when using FMFP. [Section 541(b), FAA]

## **Contract Administration Services and Catalog Data and Services**

The president is authorized to provide (without charge) quality assurance, inspection, contract administration services (CAS), and contract audit defense services in connection with procurements by, or on behalf of, a NATO member or the NATO infrastructure program, if such government provides such services in accordance with an agreement on a reciprocal basis (without charge) to the USG. A similar provision applies with respect to cataloging data and cataloging services [Section 21(h), AECA]. Effective 14 November 2005, these authorities were extended to Australia, Japan, New Zealand, and Israel [Section 534(l)(1), P.L.109-102].

## **Section 27, Arms Export Control Act, Cooperative Projects**

Under a cooperative project pursuant to Section 27, AECA, the president may enter into a written agreement with NATO, NATO members, and other eligible countries for a jointly managed program of cooperative research, development, test and evaluation (RDT&E) and joint production including follow-on support or concurrent production. Congress must receive a certification not less than 30 days prior to USG signature of a proposed cooperative project agreement [Section 27, AECA]. For additional information on international armaments cooperation, Chapter 13, “International Armaments Cooperation.”

## **Special Defense Acquisition Fund**

The special defense acquisition fund (SDAF) was authorized by Section 108(a), International Security and Development Cooperation Act of 1981, P.L.97-113, 29 December 1981, to provide DoD the authority to procure defense articles and services in anticipation of future foreign government military requirements. By permitting such advance procurements, the SDAF enabled DoD to reduce customer waiting times for selected items and to improve its responses to emergency foreign requirements, as well as to reduce the need for meeting normal FMS requirements through drawdowns or diversions of defense equipment from U.S. stocks or new production.

The SDAF was established as a revolving fund which was initially capitalized through three sources:

- Collections from FMS sales of DoD stocks not intended to be replaced
- Asset use collections and contractor payments for the use of U.S.-owned facilities and equipment
- Recouped non-recurring research, development, and production charges from both FMS and DCS.

By 1987, the SDAF reached its maximum authorized capitalization level of \$1.07 billion [10 U.S.C. 114(c)] which represented a total of the value of articles on hand and on order, as well as all unobligated funds. Although appropriated funds were authorized, no appropriations were necessary as the fund was maintained on a self-supporting basis, with Congress annually providing an obligational authority for SDAF expenditures. DSCA served as the overall DoD manager of the SDAF, while the military departments retained custody of those articles awaiting sale.

The SDAF provided a very viable method for effecting advance procurements to reduce customer waiting time as well as a source of urgently needed articles. Operation Desert Storm forces were able to use over \$130 million of articles from the SDAF stocks, to include AIM-9, STINGER, and TOW missiles, plus various types of vehicles, ammunition, night vision devices, and communications equipment.

Although the SDAF was widely viewed as an important security assistance program, a major DoD budget tightening effort begun in 1991 led to the decision in March 1993 to close down the program. For FY 1994, no new budget authority was sought for the SDAF, although Congress agreed to extend \$160 million in obligational authority (OA) into FY 1994 from the \$225 million FY 1993 budget authority. For FY 1995, \$140,000,000 in obligational authority was carried over from FY 1994, plus an added OA of \$20,000,000 extending through FY 1998 for the purpose of closing the SDAF. Section 536, P.L. 105-118, extended the obligational authority to FY 2000. Collections in FY 1994 and thereafter from SDAF sales in excess of the obligational authority provided in prior year appropriations acts must be deposited in the miscellaneous receipts account of the U.S. Treasury. Since prior year funds remain available in the SDAF account for obligation, and since numerous items remain on order, the SDAF account should be operational for several more years before all contracts are closed. With SDAF drawing to a close, Section 145, P.L. 104-164, repealed a variety of recurring status reports required by Congress under Sections 51 and 53, AECA. [DoD 5105.38-M, SAMM, C11.14]

### **EXCESS DEFENSE ARTICLES**

The term EDA is applied collectively to U.S. defense articles which are no longer needed by the U.S. armed forces. Such defense articles may be made available for sale under the foreign military sales program [Section 21, AECA] or as grant (no cost) transfers to eligible foreign countries under the provisions of Section 516, FAA, which are described below.

The following formal definition of EDA is provided in Section 644(g), FAA, and it establishes the guidelines for determining which defense articles may be treated as excess equipment.

EDA means the quantity of defense articles other than construction equipment, including tractors, scrapers, loaders, graders, bulldozers, dump trucks, generators, and compressors, owned by the United States government, and not procured in anticipation of military assistance or sales requirements, or pursuant to a military assistance or sales order, which is in excess of the Approved Force Acquisition Objective and Approved Force Retention Stock of all DoD Components at the time such articles are dropped from inventory by the supplying agency for delivery to countries or international organizations under this Act. [Section 9(b), P.L. 102-583]

The National Defense Authorization Act for FY 1993 amended 10 U.S.C. by adding a new Section 2552 which restricts the sale or transfer of excess construction or fire equipment. Such transfers or military sales in the future may only occur if either of the following conditions apply:

- No department or agency of the USG (excluding DoD), and no state, and no other person or entity eligible to receive excess or surplus property submits a request for such equipment from the Defense Reutilization and Marketing Service (DRMS) during the period for which such a request may be accepted by the DRMS
- The president determines that such a transfer is necessary in order to respond to an emergency for which the equipment is especially suited [Section 4304(a), P.L. 102-484].

For the purpose of this new provision, the term construction or fire equipment includes the following:

Tractors, scrapers, loaders, graders, bulldozers, dump trucks, generators, pumpers, fuel and water tankers, crash trucks, utility vans, rescue trucks, ambulances, hook and ladder units, compressors, and miscellaneous fire fighting equipment [Section 4304(c), P.L. 102-484].

The intent of this change is to permit federal agencies and the states the opportunity to request and receive such items before they are made available for sale or grant transfer to foreign countries or international organizations. Although this provision applies to construction equipment as well as fire equipment, the earlier exclusion above of construction equipment from the definition of excess defense equipment essentially limits the defense authorization act's restrictions to fire equipment.

As defense articles actually become excess, they are screened to determine whether they may be sold to eligible countries through FMS procedures or transferred as grant-provided items under the various provisions of the FAA, as discussed below. The ultimate responsibility for determining if an item should be identified as excess rests with the military department having cognizance over the item. Military department recommendations for the allocation of EDA to specific countries are reviewed and staffed by an EDA coordinating committee, chaired by DSCA, and comprised of representatives from the DoS, OSD, Joint Staff, commerce department, and military departments. Once a decision is made to furnish EDA to a particular country, DSCA prepares any required congressional notification.

### **Sales of Excess Defense Articles**

EDA sold through FMS procedures are priced on the basis of their condition as described in DoD 7000.14-R, *Financial Management Regulation* (FMR), Volume 15. Prices range from a high of 50 percent of the original acquisition value for new equipment, to a low of 5 percent for equipment in need of repairs. Before allowing the FMS sale of EDA, the president shall determine that the sale will not have an adverse impact on the U.S. technology and industrial base and, particularly, will not reduce the opportunities of the U.S. technology and industrial base to sell new or used equipment to the recipient country. [Section 21(k), AECA] Charges must be levied on such sales as well as on grant transfers (with certain exceptions) for the costs of packing, crating, handling, and transportation (PCH&T). Charges for any requested spares support, training, repair work, or any upgrades will also be levied.

### **Grant Transfer of Excess Defense Articles**

P.L. 104-164, 21 July 96, rationalized the cumbersome grant EDA program by combining the five different EDA authorities into one. The new authority, a revised Section 516, FAA, authorizes the president to transfer EDA on a grant basis to countries for which receipt of such articles was justified pursuant to the annual Congressional Budget Justification for Foreign Operations, FY 20XX, for counter-narcotics programs submitted under Section 634, FAA, or for which receipt of such articles was separately justified to Congress, for the FY in which the transfer is authorized.

Grant EDA transfer limitations include:

- Item must be drawn from existing DoD stocks
- No DoD procurement funds are to be used during the transfer
- Transfer is to have no adverse impact on U.S. military readiness
- Transfer is preferable to a transfer on a sales basis, after taking into account the potential proceeds from, and likelihood of, such sales and comparative foreign policy benefits that may accrue to the U.S. as the result of a transfer on either a grant or sales basis
- Transfer has no adverse impact on U.S. technology and industrial base, and particularly, will not reduce the opportunity for the sale of a new or used article

- Transfer is consistent U.S. policy for the eastern Mediterranean (Turkey, Greece, and Cyprus) established under Section 620C, FAA. [Section 516(b), FAA]

DoD funds may not be used for packing, crating, and handling, and transportation during a grant EDA transfer, except when:

- Determined to be in the national interest to do so
- Recipient is a developing country receiving less than \$10M in IMET and FMFP during the FY of the transfer
- Total transfer does not exceed 50,000 pounds
- Transfer is accomplished on a space-available basis [Section 516(c)(2), FAA]

During FY 2006/2007, DoD funds may be used for PCH&T in the transfer of grant EDA to the countries of Afghanistan, Albania, Bulgaria, Croatia, Estonia, Georgia, India, Iraq, Kazakhstan, Kyrgyzstan, Latvia, Lithuania, Macedonia, Moldova, Mongolia, Pakistan, Romania, Slovakia, Tajikistan, Turkmenistan, Ukraine, and Uzbekistan. [Section 571, P.L. 109-102]

Congressional notification thirty days prior to the transfer of EDA, whether by sale or grant, is required if the item is categorized as SME or valued (original acquisition cost) at \$7M or more. [Section 516(f)(1), FAA] Additionally, beginning in FY 1997, not more than \$425M (current value) in defense articles may be transferred in one FY as grant EDA [Section 516(g), FAA]. The grant transfer of excess naval vessels invariably exceeds this annual ceiling and therefore must be separately authorized.

#### ***Grant Excess Defense Articles for NATO, Major Non-NATO Allies, and Others***

A priority in delivery of grant EDA will be given to NATO member countries on the southern and southeastern flank (Portugal, Greece, and Turkey) and to major non-NATO allies (Israel, Egypt, and Jordan) on the southern and southeastern flanks of NATO [Section 516(c)(2), FAA]. The Philippines is also included in this priority group. [Section 1234, P.L.107-228]

After priority in delivery of grant EDA to NATO countries and major non-NATO allies on the southern and southeastern flanks, priority in delivery of grant EDA will be afforded next to countries eligible for assistance authorized by the NATO Participation Act (NPA) of 1994. [Section 609, P.L. 104-208] Initially, the latter group of eligible countries included Poland, Hungary, the Czech Republic, and Slovenia [Section 606, P.L. 104-208]. In July 1997, an invitation for NATO membership was extended to Poland Hungary, and the Czech Republic. FY 1999 legislation added Romania, Estonia, Latvia, Lithuania, and Bulgaria to the NPA eligible country list. [Section 2703, P.L. 105-277] Section 4 of the Gerald B.H. Solomon Freedom Consolidation Act of 2002, P.L. 107-187, 10 June 2002, amended the NPA to also include the country of Slovakia. This same act also endorsed the admission of the seven countries into the NATO Alliance. An invitation was extended in November 2002 to these same countries for entry into NATO in May 2004. The Senate promptly ratified the April 2003 presidential proposal for these countries.

Recently enacted NATO Freedom Consolidation Act of 2007, P.L.110-17, 9 April 2007, Section 4(b)(1), added the non-NATO countries of Albania, Croatia, Georgia, Macedonia (FYROM), and the Ukraine to NPA EDA priority delivery list. This same legislation stated the sense of Congress that these countries be admitted to NATO as they become willing and able with a clear national intent to meet the responsibilities of membership.



## **WAR RESERVES STOCKPILES FOR ALLIES**

Section 514(b) of the FAA sets an annual ceiling on the value of additions to stockpiles of U.S. defense articles located abroad that may be set aside, earmarked, reserved, or otherwise intended for use as war reserve stocks for allied or other foreign countries (other than those for NATO purposes or in the implementation of agreements with Israel). From 1979 until 1988, the Republic of Korea was the only country outside of NATO where such war reserve stockpiles were authorized to be maintained. For FY 1988, Congress approved an Administration request to establish a new stockpile in Thailand, and \$10 million in defense articles was authorized to be transferred for this purpose. Then, for FY 1990, at the initiative of Congress, \$100 million in defense articles was authorized to establish a stockpile in Israel. For FY 1991, Congress authorized stockpiles in the major non-NATO allies' countries, and \$378 million in stockpile additions, of which not less than \$300 million was designated for stockpiles in Israel, with the remainder divided between Korea (\$68M) and Thailand (\$10M). For FY 1993, Congress authorized a total of \$389M worth of U.S. defense equipment to be transferred to the war reserves stockpiles for allies (WRSA) in FY 1993; not less than \$200,000,000 was designated for stockpiles in Israel, and up to \$189,000,000 was available for stockpiles in Korea [Section 569, P.L. 102-391].

Beginning in FY 1996, the president can also designate any country for such stockpiling [Section 541(c)(2), FAA] with a fifteen-day notification to Congress. However, the value of the stocks to be set aside each year for any country (other than NATO or Israel) must be approved by annual security assistance authorizing legislation [Section 541(b)(1), FAA].

It should be understood that no new procurements are involved in establishing and maintaining these stockpiles. Rather, the defense articles used to establish a stockpile and the annual authorized additions represent defense articles which are already within the stocks of the U.S. armed forces. The stockpile authorizing legislation simply identifies a level of value for which a stockpile may be established or increased. Moreover, the defense articles which have been placed in these stockpiles remain U.S. military service-owned and controlled stocks. As the term "war reserve" implies, these stocks are intended only for use in emergencies. Any future transfer of title/control of any of these stocks to an allied or friendly country would require full reimbursement by the purchaser under FMS procedures, or from military assistance funds made available for that purpose under security assistance legislation prevailing at the time the transfer was made. An example of the requirements to transfer WRSA material is illustrated in Section 509(a)(1) of the Foreign Relations Authorization Act FY 1994 and 1995 [P.L. 103-236] with respect to Korea. The secretary of defense in coordination with the secretary of state was permitted to transfer to Korea obsolete or surplus items in the DoD inventory which are in the WRSA for the Republic of Korea in return for concessions by the Republic of Korea. The authority expired on 29 April 1996 and required congressional notification thirty days prior to the transfer which identifies the items transferred and the concessions to be given.

Section 112, P.L. 106-280, provided a similar transfer authority with the government of Israel that expired 6 October 2003. Section 13(a)(1) of the Department of State Authorities Act of 2006, P.L. 109-472, 11 January 2007, extended this transfer of WRSA for concessions authority to expire 5 August 2008. Section 13(a)(2) of P.L. 109-472 also amended Section 514(b)(2), FAA, authorizing up to \$200 million annually in WRSA stocks for Israel during FY 2007 and FY 2008.

## **COUNTRY-SPECIFIC LEGISLATION**

Numerous legislative provisions are enacted annually which apply only to one specific country, or which may apply, on occasion, to a specified group of countries. Such statutes may range from a total prohibition on the provision of any form of U.S. assistance to a particular country, to a limited

ban on furnishing certain types of assistance (e.g., a provision which prohibits military assistance but permits economic assistance). Thus, the FOAA for FY 2006 (and FY 2007) [Section 507, P.L. 109-102] prohibited any direct assistance to Cuba, Iran, Libya, North Korea, and Syria. Additionally, Title III, P.L. 109-102 prohibited FMFP assistance in FY 2006 to Sudan and Guatemala. A corresponding legislative prohibition on FY 2006 IMET assistance was applied also to Guatemala to receive expanded IMET funding only.

The statutory provisions setting forth such a prohibition generally (but not always) include the required conditions under which a specific ban may be removed. The statutory language usually calls for a determination by the president, and a presidential report to Congress, that the subject country has taken appropriate action (as required by Congress) to resolve the issue which led to the original prohibition (e.g., improved its human rights practices, eliminated corruption involving the management of U.S. grant funds, cracked down on illicit drug trafficking, etc.).

### **WEAPONS-SPECIFIC LEGISLATION**

A related regulatory provision involves what may be termed weapons-specific legislation. Such statutory provisions serve to restrict the sale of specific types of weapons to particular countries.

#### **Depleted Uranium Anti-Tank Shells**

The first such weapons-specific provision was introduced in FY 1987 when Congress placed a ban on the sale of depleted uranium (DU) anti-tank shells to any country other than the NATO member countries and the major non-NATO allies. This prohibition has been renewed annually through FY 1995 by Congress; and in FY 1992, Taiwan was added to the list of exempted countries. FY 1996 legislation did not renew DU round restriction. However, P.L. 104-164 amended the FAA to reflect the DU round sales restriction and permanently exempting the NATO countries, MNNAs, Taiwan, and any country the president determines that such a sale is in the U.S. national security to do so. [Section 620G, FAA]

#### **STINGER Missiles**

A second weapons-specific statute was introduced in FY 1988 when Congress prohibited the U.S. from selling or otherwise making available STINGER man-portable, air defense missiles to any country in the Persian Gulf region, other than Bahrain. This provision has also been renewed annually by Congress through FY 1999 [Section 530, P.L. 106-113]. However, effective with enactment on 6 October 2000, Section 705, P.L. 106-280, provides an exception to the prohibition. A one-for-one transfer of STINGERS is authorized to any Persian Gulf country if the missile to be replaced is nearing the scheduled expiration of its shelf life.

#### **Missile Technology Control Regime**

Another type of armaments regulation was introduced in the National Defense Authorization Act for Fiscal Year 1991, P.L. 101-510, Section 1703, which added to the AECA a new Chapter 7, entitled, "Control of Missiles and Missile Equipment or Technology." This legislation reflects the provisions of a 16 April 1987 international statement, referred to as the missile technology control regime (MTCR) in which seven countries, U.S., U.K., Germany, France, Italy, Canada, and Japan, agreed to restrict the international transfer of sensitive missile equipment and technology. Under the provisions of Chapter 7, sanctions may be applied against persons, defined to include individuals, corporations, and countries, which unlawfully transfer such equipment or technology. The sanctions range from the denial of USG contracts relating to missile equipment or technology, to the denial of all USG contracts to the denial of all U.S. export licenses and agreements involving items on the USML. A waiver of

these sanctions may be granted if the president determines and notifies Congress that such a waiver is either

- Essential to the national security of the U.S.
- The offender is a sole source supplier of the product or service, and the product or service is not available from any alternative reliable producer, and the need for the product or service cannot be met in a timely manner by improved manufacturing processes or technological developments [Sections 73(e) and (f), AECA]

### **Chemical and Biological Weapons**

A similar regulatory program involving the transfer of chemical and biological (C/B) weapons was introduced in 1991 with the passage of the Foreign Relations Authorization Act for Fiscal Years 1992 and 1993. This legislation added a new Chapter 8 to the AECA, entitled, “Chemical or Biological Weapons Proliferation,” and it mandates a variety of sanctions which the U.S. may take against persons, companies, and countries which unlawfully aid in the transfer of C/B weapons or the illegal use of such weapons. The sanctions range from the denial of USG procurement contracts for a company which knowingly and materially contributed to the unlawful transfer of C/B weapons/technology to the termination of all U.S. foreign assistance to a government that has used such weapons. A presidential waiver of such sanctions is authorized when such a waiver is either essential to U.S. national security interests or there has been a fundamental change in the leadership and policies of the foreign government. [Section 505(b), P.L. 102-138].

### **Anti-Personnel Landmines**

In a unique action, the National Defense Authorization Act for Fiscal Year 1993 established a one year moratorium on the transfer of anti-personnel landmines [Section 1365, P.L. 102-484]. This legislation was proposed to serve as an interim step in obtaining an international agreement for prohibiting the sale, transfer, or export of these weapons and for limiting their use, production, possession, and deployment. This legislation specifically prohibits sales, the financing of sales, commercial exports, the issuing of licenses for the export of such landmines, or the furnishing of any foreign assistance related to the transfer of such landmines during the period 23 October 1992 through 22 October 1993. [Section 1365(d), P.L. 102-484]

Subsequent annual legislation extended the moratorium to 22 October 2008, and provided the authority for the grant transfer of demining equipment available from USAID or DoS. [Section 547, P.L. 109-102] The command-activated claymore mine has been legislatively defined as not an antipersonnel landmine. [Section 580(b)(2), P.L. 104-107] Of interest are some of the statistics cited in the statute regarding anti-personnel landmines: over thirty-five countries are known to manufacture these weapons, and during the ten years from 1983 through 1992, the DoD approved the sale of 108,852 anti-personnel landmines and the DoS approved ten licenses for the commercial export of such landmines valued at a total of \$980,000. [Section 1423(a)4, P.L. 103-160] This unilateral U.S. moratorium is seen by Congress to serve as a model for adoption by other countries, and diplomatic efforts are well underway, both through the United Nations and other multilateral means, to achieve an international use or transfer ban similar to the chemical and biological (C/B) weapons prohibition.

### **SUMMARY**

Security assistance, like other USG programs, is governed by U.S. statute. The primary or basic laws are the FAA of 1961, as amended, and the AECA, as amended. Funds are appropriated for security assistance in the annual Foreign Operations, Export Financing, and Related Programs Appropriation

Act (FOAA), FY 20XX. Notwithstanding certain security assistance sales programs, such as foreign military cash sales and commercial sales which do not involve funding authorizations or appropriations, the Congress still has an interest in these programs and has, over the years, incorporated certain control and reporting measures in the law affecting these as well as appropriated programs.

Given the wide variety and complex details of these country-specific and weapons specific provisions, for additional information the reader is encouraged to consult the various legislative sources cited herein. Additionally, a useful source of such information appears in the analytical reports of new security assistance legislation published annually in the winter or spring issue of *The DISAM Journal*, depending on the passage of the annual legislation.

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